Filed 9/21/06 P. v. Guzman CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE PEDRO GUZMAN,

Defendant and Appellant.

F048683

(Super. Ct. No. 04CM0295)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jose Pedro Guzman was convicted of the first degree murder of Paul Lemos. In addition, the jury found true the special circumstance that the murder was committed during the commission of an attempted robbery. (Pen. Code, § 190.2, subd.

(a)(17).[1])[2] The jury found that a principal discharged a gun causing death during the commission of the offense and the crime was committed for the benefit of a criminal street gang. (§ 12022.53, subds. (d) & (e)(1), § 186.22.) In addition, defendant admitted he had served a prior prison term (§ 667.5, subd. (b)) and had suffered a prior serious felony conviction within the meaning of the Three Strikes law (§ 1170.12, subd (a)). Defendant was sentenced to prison for a term of life without the possibility of parole. An additional consecutive sentence of 25 years to life was imposed for the discharge of a gun and a one-year consecutive sentence was imposed for the prior prison term.[3]

Defendant appeals, claiming his counsel was ineffective in failing to move to exclude the testimony of an accomplice, Holt. In addition, he argues the trial court erred in admitting a third-party threat against a witness, and the evidence was insufficient to support the special circumstance because it failed to show that defendant was a major participant in the attempted robbery. We affirm.

Facts

A. Background

Defendant, Eduardo Hernandez, Jose Perez, and Laura Holt were all charged with the first degree murder of Paul Lemos. After being arraigned, Holt wanted to talk to law enforcement officers. She reached a plea agreement with a prison term of 13 years in exchange for her truthful testimony at the trials of her codefendants. Defendant and

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[1] All further code references are to the Penal Code unless otherwise noted.

[2] Defendant was also charged with the special circumstance that the murder was carried out in furtherance of a criminal street gang. (Pen. Code, § 190.2, subd (a)(22).) The district attorney dismissed this special circumstance immediately prior to deliberations by the jury.

[3] Because defendant received a sentence of life without the possibility of parole, the doubling provisions of the Three Strikes law did not apply to his sentence and the court did not double the sentence. (*People v. Smithson* (2000) 79 Cal.App.4th 480, 502-504.)

Hernandez were tried together and both were convicted of murder and additional allegations. Perez was tried separately and was convicted of first degree murder, two special circumstances, plus firearm and gang allegations.[4] The jury was told that Holt was an accomplice as a matter of law and that her testimony required corroboration.

B. Accomplice Testimony

Laura Holt was with defendant, Perez, and Hernandez on December 29, 2003. They spent part of the evening drinking at someone's house in Laton, and then Holt drove the group in her car to a basketball game in Riverdale. As it turned out, they did not attend the game and after a short period of time they returned to Laton and went to the home of Jose Rodriguez (a.k.a. Huero).

Holt, defendant, Hernandez and Perez smoked methamphetamine with Rodriguez, joined by Anthony Ruelas (a.k.a. Crack). Defendant, Hernandez and Perez began talking about robbing someone. Defendant asked Rodriguez for a gun. Rodriguez did not want to give it to him. Defendant told Rodriquez that he was not going to shoot the gun; he only needed it to scare someone while he robbed them. Rodriguez gave the gun to defendant.

At trial, Holt was shown a picture of a gun, and testified that the gun looked like the gun Rodriguez gave to defendant.

Holt, defendant, Hernandez and Perez left in Holt's car. Holt was driving. They drove around trying to decide where to go to rob someone. While driving around, Perez, defendant and Hernandez talked about the robbery. They discussed stealing a vehicle with a stereo system. They drove to Hanford to find their target. They drove around the Hanford mall parking lot to look at cars. They did not find anything that suited their purposes.

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[4] Hernandez (F049209) and Perez (F048495) are the subjects of separate appeals.

Discussions continued, and Perez said he wanted to do a carjacking. Hernandez wanted to do a home invasion. Defendant did not join in this discussion. Defendant and Perez argued over who was going to possess the gun. Defendant finally let Perez have his way and possess the gun. The gun had been loaded previously in the car by defendant.

The group then drove to a residential area and looked around. Again finding nothing, they returned to the area of the mall. They saw a blue Chevrolet truck, lowered, with tinted windows, driven by Paul Lemos, the victim. Hernandez liked the truck and told Holt to follow it. She did. Holt parked her car nearby while Lemos drove through the drive-through at Taco Bell and purchased food.

Holt continued to follow the truck. At one stop light the victim's truck was next to another nice truck. The group decided that the victim's truck was the nicest. Perez got out and started to go towards the truck when defendant and Hernandez told him to get back in the car.

They followed the victim in his truck until the victim arrived at his house. Holt backed the car up and stopped at the corner. She could not see the truck from her location. Perez and Hernandez jumped out and ran towards the truck. Hernandez told Holt to follow them after they obtained the truck. Defendant got out shortly afterwards and stood near the car. Holt was not sure if defendant stayed near the car because she was feeling ill from the drugs and was not paying attention. She kept the engine running.

Holt heard two gunshots. Defendant got in the car. Perez and Hernandez ran to the car and got in. They told her to take off. She did.

In the car, Hernandez said that he was punching the victim. The victim was scared and crying. Hernandez told Perez he should have used his hands instead of a gun to take things from the victim. Perez stated that he thought he shot the victim in the shoulder and missed with the other two shots. Hernandez said that Perez should have taken the victim's wallet while Hernandez was punching him.

Holt drove the group back to Laton. She was told not to say anything. Holt dropped Perez off at his house so he could change his clothes and wash up to get rid of any gun residue. Holt, defendant, and Hernandez drove back to Rodriguez's home and again used drugs. Ruelas was still there. Hernandez and defendant told Rodriquez he needed to get rid of the gun. Perez showed up shortly thereafter. The group stayed there about an hour. During this time the gun was returned to Rodriguez. They then decided they would go to Fresno to try and find some more drugs. Their trip was unsuccessful, and they returned to the home of Rodriguez and used more drugs.

Holt, defendant, Hernandez, and Perez left in Holt's car. They were stopped by police. When they were stopped, Hernandez ran and was not captured. The others discussed their alibi. They decided they would say that Holt had picked them up from City Lights in Fresno. Defendant came up with a name he would use. Officers removed them individually from the car and separated them. They were eventually allowed to leave. Holt went with defendant to his brother's house.

Two months before trial Holt was in a holding cell. Perez, Hernandez, and defendant were being held in the same area. Perez asked Holt to take back her deal and not testify; Hernandez joined in asking Holt to change her mind. Defendant told her he wanted to marry her.

C. Nonaccomplice Evidence

Christina Padilla knew the victim. On December 29, 2003, she had a cellular telephone conversation with Lemos while she was riding in a van. She heard a loud sigh and Lemos stopped talking. She heard the beeping sound that is made when the door to a vehicle is open and the keys are left in the ignition.

Diana D. lived next door to Lemos. On the night of December 29, 2003, she was outside on her front porch. She heard someone say, "Fuck you bitch, you fuckin' scrap." She looked and saw two men standing near each other by the back of the truck. One of the individuals had a gun pointed sideways at Lemos. Diana went inside of her house.

She heard three shots. She looked out and saw Lemos fall to his knees in the driveway; the other individuals ran away. She heard two car doors close and heard a car "screech off." She came out of her house and saw Lemos on the ground holding the back of his head and making moaning sounds.

When Diana first spoke to an investigator that evening, she told them she did not see anything. She was afraid. Her husband told her to tell the truth, and later that evening she told officers what she had seen.

Diana identified Perez as the person with the gun she saw standing by the victim's truck at the time he was shot.

Shirley Villagran was driving by the park. She drove further down the street and parked on the street near the victim's house so she could talk with a friend in the car. She saw a small white car parked on the corner. She heard two gunshots. She saw two people run to the car and get in. The car took off with the headlights off. Villagran followed them trying to get their license number. She stopped following the car when the car turned left towards Laton. She went back to the area and told law enforcement officers what she had seen.

Hanford police officer Richard Pontecorvo responded to the scene of the murder.[5] The truck was parked in the driveway. The driver's door was open; there was a Taco Bell bag on the ground as well as a Taco Bell cup. A cellular telephone was on the ground by the truck. They keys were in the ignition of the truck. The stereo system in the truck was not missing. There were no shell casings in the area.

In the early morning hours of December 30, 2003, Pontecorvo drove to Laton looking for the vehicle. He observed a vehicle that matched the description of the vehicle leaving the crime scene. Pontecorvo followed the vehicle. The occupants of the vehicle

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[5] The victim did not die at the scene, he died several days later.

kept looking back at Pontecorvo as he followed it. Pontecorvo stopped the vehicle. One person fled the scene. He removed the other three occupants of the car. Holt was the driver of the car. Defendant was seated in the front passenger seat; he misidentified himself as Alex Gutierrez. Perez was in the rear passenger seat. Holt said that she had picked up the men from City Lights in Fresno.

Lemos died from a single gunshot wound to the left side of his head. In addition, he had swelling to his right eye that was not consistent with a gunshot wound but was consistent with blunt force trauma. A deformed slug was recovered from the victim's brain.

Several days after the murder, a search was conducted at the home of Rodriguez. Rodriguez was there, as was Ruelas. In addition, Manuel Tapia and Raul Gonzalez were there. Officers found weapons, ammunition, drugs, and drug paraphernalia. Rodriquez said that he gave the gun to defendant for protection but the gun was never returned to him.

The home of Robert Gonzalez was searched. The weapon was not found. Several days later, Robert turned a weapon over to law enforcement. Robert is the brother of Raul Gonzalez and the uncle of Manuel Tapia, one of the individuals at the home of Rodriquez when it was searched for the weapon. Robert said he had received an anonymous call regarding the location of the gun. He went to the location and found the gun in a paper bag by the side of the road. He refused to provide any further details about the gun.

Robert testified that he received a call and the unidentified male caller asked him if he was going to testify. The caller said he knew where he lived. When the gun was turned in, Robert said he got the gun from Manuel Tapia.

A criminalist test-fired the gun turned in by Robert. Because the gun was worn and old, the criminalist was not able to get nice crisp characteristics to compare to the fragment recovered from the victim, but the bullets agreed as far as land, grooves and

twists and the bullet retrieved from the victim was consistent with being fired from the gun.

Jose Rodriquez testified that he did not know defendant, did not know Manuel Tapia, and did not give defendant a gun. He additionally testified that he did not know Perez or defendant even though there were pictures of them found in his trailer. He admitted he was convicted of possession of methamphetamine for sale and possession of a firearm as a result of the search of his house for the gun. Manuel Tapia was present when the search was conducted.

Pontecorvo said that when officers searched the home of Jose Rodriquez, Rodriquez said that defendant had not given the gun back to him.

On February 22, 2004, officers went to the home of Mimi Pina to serve an arrest warrant for Hernandez and defendant. They knocked on the door. Mimi answered and said defendant was inside with Hernandez. Officers posted at the rear of the house apprehended Hernandez and defendant after they ignored orders to go to the ground and tried to escape.

Mimi Pina testified that she was living with Hernandez and defendant on February 22, 2004. Luis Hernandez is the father of her children and also the cousin of defendant and Eduardo Hernandez. Pina was having a relationship with defendant at this time. Prior to the arrest of defendant and Hernandez, Pina had several conversations with them. Roxanne, the mother of Hernandez's children, was present during some of the conversations.

During the conversations, Hernandez told them that Perez shot the person in the truck and Holt drove them. Defendant said that Perez liked the victim's truck and Perez told Holt to follow it. Perez said he was going to take the victim's money and his truck. Defendant also said that Perez shot the victim. Pina was told that Perez told the victim to give him all of the money and the victim asked not to be killed. The victim reached for

something and Hernandez said the victim was reaching for a gun. Perez shot the victim. When defendant talked about the incident he cried and said he did not do it.

Numerous law enforcement officials described contacts with defendant, Hernandez, and Perez involving the Laton Bulldog gang and their membership in the gang.

Ralph Paolinelli, an expert on the Laton Bulldogs gang, testified that "scrap" is a term used by Norteno Bulldogs to disrespect Surenos. The Laton Bulldogs are rivals with both the Sureno and Norteno gangs. It was Paolinelli's opinion that Hernandez, Perez, and defendant are members of the Bulldog gang.

An officer searched the victim's bedroom, finding nothing associated with any type of gang affiliation.

DISCUSSION

I. Admission of Accomplice Testimony

Holt testified as an accomplice. She testified that she had been charged with the murder of Lemos. She agreed to testify truthfully against the coparticipants in the murder. In exchange for her truthful testimony, she was allowed to plead to the reduced charges of carjacking with two enhancements. Her maximum exposure of prison time was 13 years. In pretrial discussions, the prosecutor told her that she had an opportunity to be truthful so the district attorney could determine if they wanted to make a deal with her. Although she was not honest initially in her discussions or "free chat" with the prosecution investigator, she eventually told the investigator the truth about what happened.

On cross-examination by counsel for Hernandez, Holt testified that should she break her deal she would be charged with murder. Her understanding was the prosecutor would decide whether she broke her deal or not. Her deal was to testify truthfully. She did not think the prosecution would believe her if she changed her story to not implicate Hernandez.

On further cross-examination, Holt testified that she was telling the truth in court. She admitted that she had previously told investigators she was telling the truth when she was in fact lying, but she was telling the truth now in court.

Pontecorvo testified that at the beginning of Holt's "free chat" she was told to tell the truth. There were no promises or guarantees regarding her statement and if she went to trial in her own case and testified on her own behalf, anything she said in her "free chat" could be used to impeach her. The importance of telling the truth during the chat was stressed to her.

Defendant contends that his counsel was ineffective in failing to object to the testimony of Holt. He argues that based on a proper objection her testimony would have been excluded because it was given in accord with a predetermined formulation.

The case of *People v. Boyer* (2006) 38 Cal.4th 412 is instructive on this issue. "A prosecutor may grant immunity from prosecution to a witness on condition that he or she testify truthfully to the facts involved. (*People v. Green* (1951) 102 Cal.App.2d 831, 838-839.) But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted by the witness's self-interest, and thus inadmissible. (*People v. Medina* (1974) 41 Cal.App.3d 438, 455.) Such a 'strong compulsion' may be created by a condition '"that the witness not materially or substantially change her testimony from her tape-recorded statement already given to … law enforcement officers.'" (*People v. Medina*, *supra*, 41 Cal.App.3d at p. 450.)

"On the other hand, we have upheld the admission of testimony subject to grants of immunity which simply suggested the prosecution *believed* the prior statement to *be* the truth, and where the witness understood that his or her sole obligation was to testify fully and fairly. Thus, in *People v. Fields* (1983) 35 Cal.3d 329 (*Fields*), defense counsel elicited from a prosecution witness that her immunity was conditioned on testimony consistent with her prior statement. On redirect, however, the witness made clear that her prior statement *was* the truth, that the prosecutor had asked her to testify to the truth, and

that she was never asked to testify to a certain story. (*Id.* at pp. 359-360.) As we explained, the record suggested, at most, that the witness understood she was obliged to recount her prior statement *because it was the truth.* We found the evidence insufficient to conclude that the grant of immunity required the witness to testify in accord with a prior statement *regardless* of its truth. (*Id*. at pp. 360-361.)

"Similarly, in *People v. Garrison* (1989) 47 Cal.3d 746 (*Garrison*), witness Roelle's plea agreement, as disclosed at his preliminary hearing, provided that Roelle would testify truthfully at Garrison's trial, and that '"a further part of this … agreement is that … [Roelle] has already truthfully stated to the investigating detectives what happened in this case."' (*Id.* at p. 768, italics omitted.) Roelle's counsel advised the court that Roelle had passed a polygraph examination, and the prosecutor examined Roelle on voir dire to confirm the latter's understanding that, as part of his bargain, '"he [was] going to come in and tell the truth about what happened."' (*Ibid.*)

"On this record, we declined to accept the premise that Roelle's bargain was conditioned on the truthfulness of his prior statements. Rather, we noted that as in *Fields*, 'the record does not demonstrate either that the plea bargain required Roelle to testify in accord with his statement regardless of its truth, or that Roelle so understood the agreement.' Instead, we observed, 'the record reflects that the district attorney and Roelle's counsel sought to ensure that the record reflected the factual basis for their belief that permitting Roelle to plead guilty to the lesser charges would be appropriate in light of their understanding of his actual involvement in the offenses.' (*Garrison*, *supra*, 47 Cal.3d 746, 770.) We held that 'unless the bargain is *expressly contingent* on the witness sticking to a particular version, the principles of *[People v.] Medina*, *supra*, 41 Cal.App.3d 438, and *[People v.] Green*, *supra* 102 Cal.App.2d 831, are not violated.' (*Garrison*, *supra*, at p. 771, italics added.)" (*People v. Boyer*, *supra*, 38 Cal.4th at pp. 455-456.)

The above reasoning governs here. The plea bargain struck with Holt was based on her giving truthful testimony. The fact that Holt believed that if she deviated from her existing statement she would be found to not be in compliance with her bargain merely reflected the parties' mutual understanding that her existing statement was the truth, and not that Holt must testify consistently with that statement regardless of the truth. The record does not support a finding that Holt agreed to testify in conformity with the existing statement. She agreed to provide truthful testimony. Counsel was not ineffective in failing to object to the admission of Holt's testimony.

II. Admission of Threat Evidence

Robert Gonzalez turned the gun over to law enforcement. At the time he turned the gun in he said he received it from Manuel Tapia. At trial he said he found it at the side of the road. Robert testified that he had received a call at home from a male asking him if he was going to testify. He told the caller, yes. Defense counsel objected because there was no tie-in of who made the call or authorized it. The People stated that it is being offered as evidence of Robert's demeanor and the character of his testimony about finding a gun. Robert was asked how the caller responded when he said he was coming to court. Defendant objected again. The following exchange took place:

"MR. OLIVER [counsel for defendant]: I'm going to object as being hearsay unless it's not offered for the truth of the matter, your Honor. It just changes state of mind as to how this witness acted or did something.

"MR. BURNS [district attorney]: I'm trying to follow that objection.

"MR. OLIVER: Well, it's hearsay, but if --

"MR. LEE [counsel for Hernandez]: I think it's just being offered for the effect it had on this person. You're not offering it for the truth.

"MR. BURNS: I'm not offering it for the truth of the matter asserted.

"MR. OLIVER: So the jury understands it.

"THE COURT: You're withdrawing your objection?

"MR. OLIVER: With that explanation and that caveat, yes.

"THE COURT: All right."

Robert testified that the caller told him, "We know where you live, where your kids go to school." He testified that the only reason he was in court is because he was ordered to be there and he did not want to spend time in jail for not showing up.

The jury was instructed pursuant to CALJIC No. 2.06 as follows: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by dissuading a witness from testifying, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Defendant contends the court violated his right to due process by permitting the jury to infer his guilt based on a third-party threat which he never authorized.

Both defendant and respondent fail to state in their briefs that there is other evidence in the record to which the instruction clearly applied. Holt testified that in March 2005 she was brought to court and she had contact with all three of the defendants. They talked to her. Perez talked to her about taking her deal back, and Hernandez mentioned it also. Defendant told her he wanted to marry her.

CALJIC No. 2.06 clearly applied to this evidence, including defendant's offer of marriage to Holt, which could infer an attempt to dissuade her to testify, particularly when it was made at the same time that Hernandez and Perez were attempting to get her to take back her deal. Thus the giving of the instruction was not erroneous. In addition, at the time the objection was made to the testimony regarding the threats to Robert Gonzalez the parties seemed satisfied that the jury was aware that the testimony was limited on the question of Robert's demeanor and was not being offered for the truth.

We additionally note that the parties did not request a limiting instruction. The court is not required to give a limiting instruction sua sponte but shall do so on request.

(*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.) The parties did not request that a limiting instruction be given regarding the testimony of threats to Robert. Defendant has failed to demonstrate error.

III. Substantial Evidence Special Circumstance

The jury found true the special circumstance that the murder was committed during an attempted robbery. "In order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony. (§ 190.2, subds. (c), (d).)" (*People v. Proby* (1998) 60 Cal.App.4th 922, 927.)

Defendant contends the evidence is insufficient to show that he acted with reckless indifference to human life while acting as a major participant in the underlying felony. Defendant argues that sufficient evidence to support the special circumstance as to an aider an abettor is not established unless the prosecution shows defendant either (1) planned to kill, (2) was personally armed with and used a weapon, (3) actively participated in a violent felony such as rape, or (4) participated in prior felonies with the codefendant where the codefendant killed. Defendant asserts that no such evidence was presented here.

Sufficient evidence of the special circumstance against an aider and abettor was found in *People v. Hodgson* (2003) 111 Cal.App.4th 566:

"In this context, a 'major participant' in the underlying crime includes persons '"notable or conspicuous in effect or scope" and "one of the larger or more important members or units of a kind or group."'

"It is true the evidence of appellant's involvement in the underlying crimes is not as extensive as in other cases upholding robbery-murder special-circumstance findings. For example, in *People v. Proby* the evidence established the defendant supplied the

murder weapon to the actual killer; he was armed with a semiautomatic handgun; he saw 'pus' ooze out of the victim's head but did nothing to assist the victim; and helped his cohort take money and gift certificates out of the restaurant safe.

"Similarly, in *People v. Bustos* [(1994) 23 Cal.App.4th 1747] the defendant helped plan the robbery of a particular victim because they wanted to steal her car. He carried out his role in the plan by physically subduing the victim after she entered the public bathroom and by grabbing her purse. After his cohort fatally stabbed the victim twice, he fled with his accomplices and the robbery loot and left the victim to die.

"Also in *People v. Mora* [(1995) 39 Cal.App.4th 607], the evidence was sufficient to sustain the special circumstance finding. The defendant helped plan the robbery; was instrumental in arranging for his accomplice to enter the victim's home with a rifle; when his cohort shot the victim he carried through with the plan to steal; carried the loot away; and left the victim to die.

"In *Tison v. Arizona* [(1987) 481 U.S. 137] the United States Supreme Court held the Eighth Amendment did not prohibit a death sentence for a major participant in a felony which results in murder and whose mental state is one of reckless indifference to human life. In *Tison,* the defendants with the help of others planned and carried out the escape of their father from prison where he was serving a life sentence for having killed a guard during a previous escape. The defendants entered the prison with an ice chest full of guns, armed their father and another convicted murderer, later helped to abduct, detain and rob a family of four, and then stood by and watched their father and the other convict murder the family members. The defendants made no attempt to help the victims, but drove away in the victims' car with the others.

"The present case does not present evidence appellant supplied the gun, or was armed, or personally took the loot, or the like. Nevertheless, his role in the robbery murder satisfies the requirement his assistance be 'notable or conspicuous in effect or scope.'

"To begin with, this is not a crime committed by a large gang or a group of several accomplices. Instead only two individuals were involved. Thus, appellant's role was more 'notable and conspicuous'--and also more essential--than if the shooter had been assisted by a coterie of confederates. By slowing down the closing automatic electric garage gate appellant was instrumental in assisting Salazar effect his escape with the loot. From their actions it appears appellant and Salazar believed the garage gate was the only access route for their escape. The evidence showed appellant used the full force of his body to try to keep the gate from closing until Salazar had accomplished the robbery and secured the loot. When the gate became dangerously close to closing appellant yelled a warning to Salazar and got out of his way to permit Salazar to exit. Appellant's actions suggest he believed Salazar would have been trapped inside the garage with his victim unless he acted to prevent the gate from closing. The fact police later discovered a low wall over which someone could have climbed to reach the street does not alter the men's own perception of the roles each had to play. Because appellant was the only person assisting Salazar in the robbery murder his actions were both important as well as conspicuous in scope and effect.

"A rational juror could also have found the evidence established appellant acted with 'reckless indifference to human life.' This phrase 'is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.' Even after the first shot it must have been apparent to appellant Ms. Nam had been severely injured and was likely unconscious. Her car rolled into the garage and collided with a pillar and another car. Appellant had to be aware use of a gun to effect the robbery presented a grave risk of death. However, instead of coming to the victim's aid after the first shot, he instead chose to assist Salazar in accomplishing the robbery by assuming his position at the garage gate and trying to keep it from closing until Salazar could escape from the garage with the loot." (*People v. Hodgson*, *supra*, 111 Cal.App.4th at pp. 584-586, fns. omitted.)

In this case, defendant was the individual who acquired the gun and loaded it. He participated fully in the plans to commit an armed robbery. He participated in the stalking of the victim and called off Perez when he started to approach the victim on a public street. Defendant got out of the car, presumably acting as a lookout, while Perez and Hernandez committed the attempted robbery. Defendant heard the gunshots and jumped in the car, not offering any assistance to the victim. Under these facts the jury could properly have found that defendant was a major participant and acted with a reckless indifference to human life. Substantial evidence supports the special circumstance.

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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CORNELL, J.

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DAWSON, J.